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Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception With the Physical Intrusion Standard

Gregory T. Helding
greg.helding@gmail.com

STOP HAMMERING FOURTH AMENDMENT RIGHTS: RESHAPING THE COMMUNITY CARETAKING EXCEPTION WITH THE PHYSICAL INTRUSION STANDARD

In 1973, the U.S. Supreme Court recognized the community caretaking exception to the Fourth Amendment's prohibition against unreasonable searches and seizures. As its name suggests, the exception acknowledges that police officers act not merely as law enforcers, but also as community caretakers, rendering aid to those in need, and acting to protect both people and property from harm. As originally conceived, the community caretaking exception was limited to situations involving automobiles where police were performing functions totally divorced from law enforcement. Over the years, courts have expanded the exception considerably. Police officers who suspect a crime has taken place may now search without a warrant as long as those officers—or a court—can articulate an objectively reasonable basis for community caretaking after the fact. Worse still, many jurisdictions allow these warrantless searches in homes. What began as a reasonable and limited exception has become a mechanism that allows police officers—with the courts at times acting as their willing accomplices—to use false concern for citizens' welfare as a subterfuge to enter their homes at will to investigate crime. This Comment urges the U.S. Supreme Court to use the recently revived physical trespass standard to reshape the community caretaking exception and restore to their preeminent level the Fourth Amendment guarantees that once protected our hearths and homes.

I. INTRODUCTION

On September 11, 1969, Chester Dombrowski drove his rented vehicle off the road outside West Bend, Wisconsin.[1] While responding to the accident, local police learned that Dombrowski was a Chicago police officer.[2] Dombrowski appeared intoxicated and was arrested for drunken driving.[3] Because of the injuries Dombrowski sustained in the accident, the police transported him to the local hospital.[4] Dombrowski lapsed into a coma, during which time an officer searched his car in an effort to locate Dombrowski's duty revolver.[5] The officer was unable to locate the revolver, but when he opened the locked trunk of the car, he found clothing, a nightstick, a floor mat, and a towel—all of which were covered in blood.[6] Dombrowski was subsequently charged with first-degree murder.[7] During the trial, he objected to the admission of the evidence recovered from the trunk because the officer obtained it without a warrant.[8] The Wisconsin Supreme Court upheld the conviction on appeal, holding that when the officer opened the locked car trunk, it was not a search.[9] While in prison, Dombrowski brought a habeas corpus action in federal court again arguing that the evidence was acquired in violation of his Fourth Amendment rights.[10] His case made it to the U.S. Supreme Court, and the Court held that the search was reasonable because the police officer was exercising a "community caretaking function[], totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," when the officer entered the locked trunk to secure Dombrowski's property.[11] This case, *Cady v. Dombrowski*, gave rise to what has become known as the "community caretaking" exception to the Fourth Amendment prohibition against warrantless—and thus unreasonable—searches.[12]

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1. Cady v. Dombrowski, 413 U.S. 433, 434–36 (1973).
2. *Id.* at 436.
3. *Id.*
4. *Id.*
5. *Id.* at 436–37.
6. *Id.* at 437.
7. State v. Dombrowski, 44 Wis. 2d 486, 492, 171 N.W.2d 349, 352–53 (1969).
8. *Id.* at 493–94.
9. *See id.* at 496.
10. Dombrowski v. Cady, 319 F. Supp. 530, 530 (E.D. Wis. 1970), *rev'd*, 471 F.2d 280 (7th Cir. 1972), *rev'd*, 413 U.S. 433 (1973).
11. *Cady*, 413 U.S. at 441, 448.
12. *Id.* at 441–43.

The community caretaking exception provides that "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches."[13] The concept of "'[c]ommunity caretaking' denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm, to preserve property, or []to ['create and maintain a feeling of security in the community.'"[14] In *Cady*, for example, police were acting to preserve Dombrowski's property and protect the public from the danger of an unsecured weapon when they searched his vehicle for his service revolver.[15] When the community caretaking exception was established, it was strictly limited to vehicle searches.[16] However, that limitation did not hold and the community caretaking exception was eventually expanded beyond vehicle searches and into homes, as illustrated by a recent Wisconsin case.[17]

On August 24, 2006, Milwaukee police received an anonymous tip that Juiquin Pinkard and his girlfriend "appeared to be sleeping" near "cocaine, money and a scale" in an apartment, the door to which was ajar.[18] The officer who received the tip "was concerned" about Pinkard and his girlfriend, so he contacted a member of the police gang unit, who later testified that he thought the description of the apartment "sounded like a drug house."[19] When he and four other officers went to check on the couple, they knocked on the door, which was "three-quarters open," but received no answer.[20] After only thirty to forty-five seconds, the gang unit entered the apartment and soon located the couple asleep—along with drugs, cash, and a handgun.[21] The Wisconsin Supreme Court upheld Pinkard's conviction for drug possession, holding

13. State v. Pinkard, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592, *cert. denied*, 131 S. Ct. 1001 (2011).

14. Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 272 (1998) (alteration in original) (quoting STANDARDS FOR CRIMINAL JUSTICE § 1-2.2 (1980)).

15. *See supra* note 5 and accompanying text.

16. *Cady*, 413 U.S. at 441–43, 447–48.

17. *Pinkard*, 2010 WI 81, ¶ 27.

18. Brief of Plaintiff-Respondent at 7, State v. Pinkard, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592 (No. 2008AP1204-CR), 2009 WL 3443175 at *5.

19. Brief of Plaintiff-Respondent, *supra* note 18, at 7. Despite their concern, officers did not bring emergency medical personnel with them to the apartment, and they later testified that they did not believe there was a medical emergency at the time they entered the home. *Pinkard*, 2010 WI 81, ¶¶ 85–88.

20. Brief of Plaintiff-Respondent, *supra* note 18, at 7–8.

21. *Id.* at 8–9.

that the community caretaking exception applied to the search of his home.[22] This holding expanded the community caretaking exception by changing it from a justification for inventory searches of vehicles, "totally divorced" from investigation, to a justification for warrantless home entries and searches, conducted for the mixed motives of caretaking and investigation.[23] Under the aegis of community caretaking, police, originally allowed to act only for the protection of people and property in vehicles, could now search a home for evidence of a crime without a warrant as long as they had some level of concern for the welfare of the suspect—or some concern could be articulated after the fact.[24]

Dissenting in *Cady*, a prescient Justice Brennan seemed to warn the majority that the community caretaking exception was not quite as benign as it thought, calling the exception a "serious departure from established Fourth Amendment principles."[25] Thirty-seven years later, Wisconsin Supreme Court Justice Ann Walsh Bradley issued a similar warning to her colleagues[26] as they added Wisconsin, the very state that created the *Cady* community caretaking exception, to the growing list of jurisdictions that reject the limitation of the exception to vehicles and use it instead to justify the warrantless search of a home.[27] The justices' warnings have gone unheeded and, consequently, the potential problems about which they warned have become reality. While the Third, Seventh, Ninth, and Tenth Circuits have continued to limit the application of the community caretaking exception to automobiles,[28] the Fourth, Sixth, and Eighth Circuits, and an increasing number of state

22. *Pinkard*, 2010 WI 81, ¶¶ 16, 28.

23. *Id.* ("[W]e have concluded that under certain circumstances a reasonably exercised community caretaker function may permit a warrantless entry into a home . . . ."); *see also infra* Part II.C.2.e.

24. *See, e.g.*, *infra* notes 176–78, 265 and accompanying text.

25. Cady v. Dombrowski, 413 U.S. 433, 454 (1973) (Brennan, J., dissenting) ("I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles.").

26. *Pinkard*, 2010 WI 81, ¶ 66 (Bradley, J., dissenting) ("I fear that today's close call will become tomorrow's norm.").

27. *See id.* ¶ 20 (majority opinion) (allowing warrantless entry to homes when "the community caretaker function was reasonably exercised under the totality of the circumstances"); *infra* Parts II.C.1–2.

28. Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 GEO. MASON U. C.R. L.J. 249, 264 (2012).

courts, have expanded the exception to allow for the warrantless searches of homes.[29]

This Comment explores that expansion, rejects a recent call for a "community caretaking warrant," and argues that the U.S. Supreme Court must roll back the expansion of the community caretaking exception that allows warrantless searches of homes. In Part II, this Comment discusses the background of the community caretaking exception. It also briefly explains Fourth Amendment rights and discusses the development of relevant exceptions to the warrant requirement. In addition, Part II covers the development and expansion of the community caretaking exception and lays out in detail the current state of the law vis-à-vis the exception. Part III makes the case that it is both unnecessary and unwise to expand the community caretaking exception to cover the warrantless entry of homes. This analysis begins in Part III.A with a discussion of how the emergency doctrine eliminates the need for the community caretaking exception in cases of true emergency. Part III.B continues with an explanation of how less-than-emergency conditions are not sufficient to overcome the Fourth Amendment protections that up to now have been guaranteed to people in their homes. Part III.C rejects a proposal to use "community caretaking warrants" as a solution to the problem of community caretaking expansion.[30] Part III.D concludes the analysis by calling for a rollback of the expansion of the community caretaking exception and suggests how this rollback should occur in light of the recent U.S. Supreme Court decisions that return property rights to the arena of Fourth Amendment protection jurisprudence. Part IV makes a final plea to the U.S. Supreme Court to restore the Fourth Amendment guarantees that once protected our hearths and homes.

II. BACKGROUND

A. Fourth Amendment Rights

The Fourth Amendment guarantees people the "right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches."[31] This guarantee does not prohibit all searches, just those

29. *See infra* Parts II.C.1–2.

30. *See generally* Marinos, *supra* note 28 (proposing a "community caretaking warrant" as a solution).

31. U.S. CONST. amend. IV. We are also protected from unreasonable "seizures," *id.*, but the focus of this Comment is on the expansion of the community caretaking doctrine to

deemed "unreasonable."[32] Warrantless, unconsented searches of a home are per se unreasonable—unless the search falls within one of the recognized exceptions to the warrant requirement.[33] However, before considering when a search is "unreasonable," and thus prohibited, one must first look at what is meant by a "search."

When police[34] are simply observing, they are not searching.[35] Something more is required in order for their actions to constitute a search.[36] Prior to the mid-twentieth century, Fourth Amendment protections were rooted in and aimed toward the protection of rights in property.[37] In the past, like today, when the police physically entered a home without consent, such an entry was a search.[38] The material nature of the thing being searched and whether such thing was trespassed upon were keys to the analysis.[39] For example, in *Olmstead v. United States*, the Supreme Court upheld warrantless wiretaps of phone wires outside the home.[40] Because there was no "actual physical invasion of [the]

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allow warrantless entry into homes. Accordingly, the remainder of the discussion will focus on searches, particularly as they apply to homes.

32. This concept is clear from the language of the amendment itself, which protects against "unreasonable searches." *Id*. Some searches, therefore, are impliedly reasonable and thus allowed under the amendment.

33. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 6.1(b) (5th ed. 2012) ("[I]t [is] 'a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable.'" (quoting Payton v. New York, 445 U.S. 573, 586 (1980))).

34. For purposes of this Comment, "police," when not mentioned in the facts of a particular case, refers to law enforcement or law enforcement officers in general.

35. United States v. Jones, 132 S. Ct. 945, 953 (2012) ("[M]ere visual observation does not constitute a search.").

36. *See id.* at 950 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).

37. The Fourth Amendment's focus on protecting property rights is clear from the text of the amendment itself, which guarantees people the right "to be secure in their persons, *houses, papers and effects*," and requires that warrants must "particularly describ[e] the *place* to be searched, and the persons or *things* to be seized." U.S. CONST. amend. IV (emphasis added). As the Court noted in *Jones*, this qualifying language "would have been superfluous" if there was not a "close connection" between the amendment and property. *Jones*, 132 S. Ct. at 949. Moreover, in *Jones*, the Court stated that its "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *Id.*

38. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(b) (5th ed. 2012) ("It is beyond question, therefore, that an unconsented police entry . . . into a residential unit . . . constitutes a search . . . .").

39. *Jones*, 132 S. Ct. at 949 ("[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); Olmstead v. United States, 277 U.S. 438, 464 (1928) ("The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects.").

40. *Olmstead*, 277 U.S. at 464. Perhaps the Court had trouble grappling with the

house,"[41] and telephone conversations are not tangible things, the Court reasoned that the wiretaps were not searches.[42] This focus on the physical nature of the place or thing being searched shifted drastically with *Katz v. United States*.[43]

In *Katz*, the FBI attached a listening device to a phone booth in Los Angeles.[44] Charles Katz used that phone booth to violate federal law by placing wagers to others in Miami and Boston.[45] The listening device allowed FBI agents to hear Katz's side of the conversations without them physically entering the phone booth.[46] In overturning Katz's conviction, the Court noted that "the Fourth Amendment protects people—and not simply 'areas,'" and held that the Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[47] After *Katz*, a search was defined as a government intrusion on an area where a person has a subjective "expectation of privacy" that "society is prepared to recognize as 'reasonable.'"[48]

Under the "reasonable expectation" standard, the level of protection provided by the Fourth Amendment varies with individual privacy expectations.[49] For example, in *New York v. Class*, the "less substantial"

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enormity of how to apply the amendment to the relatively new technology of the telephone, which was invented only fifty years before *Olmstead* was decided. *Id.* at 465 ("The language of the Amendment [cannot] be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office."). The Court also mentions both the telegraph, which was still in use at the time, and telephone messages in its analysis. *Id.* at 464.

41. *Id.* at 466.

42. *Id.* at 464.

43. Katz v. United States, 389 U.S. 347, 353 (1967) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."). The seeds of this shift were sown in Justice Brandeis' dissent to the *Olmstead* decision. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) ("[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.").

44. *Katz*, 389 U.S. at 348.

45. *Id.*; Katz v. United States, 369 F.2d 130, 130–32 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

46. *Katz*, 389 U.S. at 348–49.

47. *Id.* at 353.

48. *Id.* at 361 (Harlan, J., concurring). Justice Harlan explained how this new standard could protect some but not all "objects, activities, or statements" that take place in a home. *Id.* ("Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.").

49. *See* LAFAVE, *supra* note 38, § 2.1(b).

expectation of privacy in an automobile allowed a police officer to reach inside Benigno Class's auto to move papers that obscured its VIN tag.[50] However, individual privacy expectations reach their zenith in the home, which is "accorded the full range of Fourth Amendment protections."[51] In *United States v. United States District Court for the Eastern District of Michigan*, the U.S. Supreme Court again made this point while bridging the gap between the "physical trespass" and "reasonable expectation" standards when it observed that "[t]hough physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance."[52]

The reasonable expectation standard dominated Fourth Amendment jurisprudence until two recent Supreme Court decisions re-emphasized the property roots of the Fourth Amendment.[53] In *United States v. Jones*, FBI agents attached a GPS monitoring device to Antoine Jones's Jeep Grand Cherokee and tracked his movements over a twenty-eight-day period.[54] The majority in *Jones* ignored the government's argument that Jones did not have a "reasonable expectation of privacy" in the underbody of his Jeep and held that attaching the GPS device was a physical intrusion and, thus, a search that violated the Fourth Amendment.[55] In noting that "the *Katz*

50. New York v. Class, 475 U.S. 106, 108, 111–12 (1986) ("A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile."); Arizona v. Gant, 556 U.S. 332, 345 (2009). "[A] motorist's privacy interest in his vehicle is less substantial than in his home," *Gant*, 556 U.S. at 345 (*citing Class*, 475 U.S. at 112–13), however, the "interest [in his vehicle] is nevertheless important and deserving of constitutional protection." *Id.* (citing Knowles v. Iowa, 525 U.S. 113, 117 (1998)).

51. Lewis v. United States, 385 U.S. 206, 211 (1966).

52. United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

53. *See* United States v. Jones, 132 S. Ct. 945, 949 (2012); LAFAVE, *supra* note 38, § 2.1(e) ("While the Supreme Court's decision in *Katz v. United States* seemed to sound the death knell for the pre-*Katz* 'trespass' approach to determining the scope of the Fourth Amendment's coverage, over fifty years later, in *United States v. Jones*, the trespass doctrine re-emerged as an alternate theory to the *Katz* expectation-of-privacy approach."(footnotes omitted)); *see also* Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013) (holding that the government's use of forensic narcotic dogs in the curtilage of a home was a physical intrusion and thus a search within the meaning of the Fourth Amendment).

54. *Jones*, 132 S. Ct. at 948.

55. *Id.* at 949–50 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)) ("The Government contends that . . . Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents . . . . But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test," the Court made it clear that while the trespassory test may have been down for a while, it was not out.[56]

In *Florida v. Jardines*, the Supreme Court built on *Jones* and further revived the trespassory test by applying it in a case involving the search of a home.[57] In *Jardines*, Miami-Dade detectives obtained a search warrant for Joelis Jardines's home only *after* a drug-sniffing dog that they brought onto his front porch detected the odor of marijuana.[58] Noting that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy," the Court held that using drug-sniffing police dogs on the curtilage of the home was a physical intrusion and thus a search within the meaning of the Fourth Amendment.[59]

A rule like the trespassory test makes for more clear-cut decisions, such as the decisions in the *Olmstead*, *Jones*, and *Jardines* cases.[60] However, *Jones* and *Jardines* are recent decisions, and the U.S. Supreme Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness'"—which is a standard and not a rule.[61] In general, standards allow for less certain and more varied outcomes than rules.[62]

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56. *Jones*, 132 S. Ct. at 952. The Court further clarifies this notion in a footnote: "A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy." *Id.* at 951 n.5.

57. *Jardines*, 133 S.Ct. at 1417–18 (holding that the government's use of a drug-sniffing dog in the curtilage of a home was a physical intrusion and thus a search within the meaning of the Fourth Amendment).

58. *Id.* at 1413.

59. *Id.* at 1417–18.

60. *See supra* notes 40, 53, 57 and accompanying text.

61. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012); Ohio v. Robinette, 519 U.S. 33, 39 (1996) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).

62. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (encouraging appellate judges to avoid standards in favor of rules where possible); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1723 (1996) (book review) ("[J]udges applying the increasingly malleable standard of reasonableness can adopt whatever policies they prefer."). Professor Sullivan explains that legal standards allow for more flexibility: "A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts," whereas "[a] legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992). Professor Sullivan goes on to note that standards "giv[e] the decisionmaker more discretion than do rules." *Id.* at 58–59.

This characteristic is especially evident in the reasonableness standard,[63] which is often referred to as a "malleable standard."[64] Unfortunately, this malleability can work both for and against those who seek the protection guaranteed by the Fourth Amendment.[65]

In *Katz*, reasonableness was used to expand people's rights under the Fourth Amendment, whereas the trespassory test would have limited them.[66] Like metal, which is considered malleable if it can be "hammered, pounded, or pressed into various shapes without breaking,"[67] the reasonable expectation of privacy standard has been hammered, pounded, and pressed so much that the government felt confident arguing in *Jones* that the standard should now allow the very

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63. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

64. Legal scholars and jurists alike agree that reasonableness is a malleable standard:

> Reasonableness, then, is not a definite, arithmetic, objective quality that is independent of aims and values. It is a concept that is considerably more subtle, complex, *malleable*, and mysterious than the simplistic model of human decisionmaking relied upon by those who accept at face value the "reasonableness" or "rationality" of conduct that not only expresses controversial moral and political judgments but that also expresses deep-seated, perhaps unconscious, affections, fears, and aversions.

RANDALL KENNEDY, RACE, CRIME, AND THE LAW 144–45 (1997) (emphasis added). Quoting Circuit Judge Ferguson, Justice Marshall once referred to reasonable suspicion as having a "chameleon-like way of adapting to any particular set of observations." United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (quoting United States v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)); *see also* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 265 (1993) ("The decline of rules in fourth amendment theory is exemplified by a number of recent cases in which the Court determines the constitutionality of government conduct by resorting to a malleable 'objective' test of reasonableness viewed from the police officer's perspective."); Eugene D. Bryant, Note, *Snoop Dogs: An Analysis of Narcotics Canine Sniffs of Storage Units Under the Fourth Amendment*, 40 GA. L. REV. 1209, 1243 (2006) ("While the reasonableness test is malleable and subject to various interpretations by judges in different jurisdictions, the courts are not alien to discretionary tests. The Supreme Court has inquired into reasonableness since the [*Terry v. Ohio*] decision in 1968."); Garth Thomas, Note, *Random Suspicionless Drug Testing: Are Students No Longer Afforded Fourth Amendment Protections?*, 46 N.Y.L. SCH. L. REV. 821, 848–49 (2002–2003) ("[T]he Court's deviation from the warrant requirement to the 'reasonableness' approach to Fourth Amendment interpretation has provided school districts with a malleable solution devoid of individualized suspicion.").

65. *See supra* note 62.

66. *See supra* notes 43–48 and accompanying text.

67. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 870 (Michael Agnes & David B. Guralnik eds., 4th ed. 2002).

intrusion it first forbade in *Katz*.[68] Are the rights evaluated and protected by the reasonableness standard malleable as well? *Jones* demonstrated that Fourth Amendment rights have not been broken.[69] However, those rights have proven to be as malleable as the reasonableness standard.[70] The various shapes into which they have been beaten make up the exceptions to the warrant requirement, some of which this Comment will now explore.

B. Exceptions to the Warrant Requirement

Over time, the courts have developed various exceptions to the warrant requirement.[71] This Comment focuses on the community caretaking exception and its expansion to allow warrantless home searches. It examines only those exceptions that relate to the community caretaking exception: the emergency doctrine, administrative warrants, and, of course, community caretaking itself.

1. The Emergency Doctrine Exception

At 3 a.m. on July 23, 2000, Brigham City police officers, responding to a loud noise complaint, observed a melee through the windows of the

68. *See supra* note 55. In *Katz*, a device was placed on the exterior of a phone booth to listen to conversations. Katz v. United States, 389 U.S. 347, 348 (1967). In *Jones*, a device was placed on the exterior of a vehicle to track its movements. United States v. Jones, 132 S. Ct. 945, 948 (2012). In *Katz*, the reasonableness standard was used to protect against such an intrusion, whereas in *Jones*, the government urged that same standard be used to allow such an intrusion. *Jones*, 132 S. Ct. at 950; *Katz*, 389 U.S. at 353. A mere forty-five years after *Katz*, a situation very similar to the one that gave rise to the new standard and its accompanying protections could have been left outside those very protections by the standard that created them. *See Jones*, 132 S. Ct. at 950–51. "Like the Ouroboros swallowing its tail, [the reasonableness standard] has ingested its own original justification." Youngblood v. West Virginia, 547 U.S. 867, 874 (2006) (Scalia, J., dissenting).

69. *Jones*, 132 S. Ct. at 950–51.

70. *See* Cloud, *supra* note 64, at 265.

71. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (finding an exception where "voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises" (citations omitted)); Barnes v. State, 25 Wis. 2d 116, 121, 130 N.W.2d 264, 267 (1964) (finding an exception where "the person freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied"); State v. Stewart, 2011 WI App 152, ¶ 24, 337 Wis. 2d 618, 807 N.W.2d 15, *review denied*, 2012 WI 34, 339 Wis. 2d 737, 810 N.W.2d 223 (2012) ("One such exception applies when, incident to a lawful arrest, police search a vehicle when 'it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."'" (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009))).

home, which they subsequently entered.[72] The melee involved four adults, all of whom were intoxicated at the time, and a juvenile.[73] The adults were charged with several minor offenses stemming from these events.[74] At trial, the defendants argued that the officers' warrantless entry into the home violated the Fourth Amendment and moved to suppress the evidence gained by the entry.[75] In an "odd flyspeck of a case," the suppression motion made it to the U.S. Supreme Court,[76] which succinctly defined—and reiterated—the emergency doctrine.[77] The Court held that "law enforcement officers [are permitted to] enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[78] Six years later, in *Ryburn v. Huff*, the U.S. Supreme Court clarified that its recent cases on the emergency doctrine mean "the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence."[79]

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72. Brigham City v. Stuart, 547 U.S. 398, 400–01 (2006).

73. *Id.* at 401.

74. *Id.*

75. *Id.*

76. *Id.* at 407 (Stevens, J., concurring).

77. *Id.* at 403–04 (majority opinion). This is not to be confused with the "emergency doctrine" (sometimes referred to as the "sudden emergency doctrine") from the common law of torts, which applies in cases of negligence. RESTATEMENT (SECOND) OF TORTS § 296 (1965) ("In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action."). Both doctrines are similar in that they take emergency circumstances into account when evaluating, after the fact, the reasonableness of a person's actions in a given situation.

78. *Brigham City*, 547 U.S. at 403. The Supreme Court first recognized this exception in 1978. Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("We do not question the right of the police to respond to emergency situations.").

79. Ryburn v. Huff, 132 S. Ct. 987, 990 (2012) (per curiam). This case is of interest in light of the recent national focus on school shootings in the wake of the Newtown, Connecticut massacre. *See, e.g.*, Steve Vogel et al., *Killer's Motive Still a Mystery*, WASH. POST, Dec. 16, 2012, at A1. In *Ryburn*, officers were responding to a home to investigate a rumored threat from a student to "shoot up" his school. *Ryburn*, 132 S. Ct. at 988. When the police arrived at the home to inquire about the threat, they encountered strange behavior from the student's mother, which prompted them to enter the home. *Id.* at 988–89. The officers did not conduct a search of the home or the occupants, but their actions were subsequently challenged in a § 1983 action. *Ryburn*, 132 S. Ct. at 988–89; *see also* 42 U.S.C. § 1983 (2006). The Court issued a forceful *per curiam* opinion in which they reversed the Ninth Circuit and entered a judgment in favor of the officers. *Ryburn*, 132 S. Ct. at 988, 990–92 ("No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction.").

Also known as the "emergency aid" exception, the emergency doctrine is often confused with the "exigent circumstances" exception.[80] The emergency aid exception focuses on the protection of people, whereas the exigent circumstances exception focuses on the protection of evidence.[81] This distinction is important because the original formulation of the community caretaking exception involves police actions totally divorced from investigation.[82] In the early years of its development, the emergency aid exception took a similar approach:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, *that they do not enter with an accompanying intent to either arrest or search.*[83]

This approach is reflected in the three-part *Mitchell* test,[84] which was first articulated by the New York Court of Appeals:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.
>
> (2) The search must not be primarily motivated by intent to arrest and seize evidence.

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80. *See* State v. Jones, 947 P.2d 1030, 1037 (Kan. Ct. App. 1997) ("[T]he exigent circumstances exception is distinct from the emergency exception, and the two are often confused . . . ."); MacDonald v. Town of Eastham, No. 12-12061-RGS, 2013 WL 2303760, at *5 (D. Mass. May 24, 2013) (noting a "widely-shared confusion between and among the distinct doctrines of community caretaking, emergency aid, and exigent circumstances"); State v. Pinkard, 2010 WI 81, ¶ 26 n.8, 327 Wis. 2d 346, 785 N.W.2d 592, *cert. denied*, 131 S. Ct. 1001 (2011); Isaac J. Colunga, *When the Supreme Court Departs from Its Traditional Function*, 45 VAL. U. L. REV. 47, 53 (2010) ("[I]n applying the emergency aid exception, some courts consider it a variation of the exigent circumstances exception . . . .").

81. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970) ("[A] search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.").

82. *See supra* note 11 and accompanying text.

83. Edward G. Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFF. L. REV. 419, 426 (1973) (emphasis added).

84. People v. Mitchell, 347 N.E.2d 607, 609 (N.Y. 1976), *abrogated by* Brigham City v. Stuart, 547 U.S. 398 (2006).

> (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.[85]

The second prong ensures that the "protection of human life or property in imminent danger *must be the motivation for the search* rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding."[86] Some courts have adopted this test to evaluate law enforcement's use of the emergency aid exception[87] but most jurisdictions have not.[88] Although state courts are free to maintain the motive requirement articulated in the *Mitchell* test, the U.S. Supreme Court eliminated that option for federal courts in the *Brigham City v. Stuart* decision in 2006.[89] Now, "[a]n action is 'reasonable' under the Fourth Amendment, *regardless of the individual officer's state of mind*, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[90]

Simply stated, the emergency aid exception says that, police do not need a warrant to enter a home to provide help to the injured or prevent further injury in an emergency, even if the police are also there to investigate crime or detain suspects, as long as there is an objectively reasonable basis for the actions taken by police.[91] For example, in *Brigham City*, the police did not need a warrant to enter the home to stop people from being injured in a fight, even if they were also planning on arresting some of those participating in the fight.[92]

2. Administrative Warrants

As the name implies, the administrative warrant is not, strictly speaking, an exception to the warrant requirement. Under the Fourth

85. *Mitchell*, 347 N.E.2d at 609.

86. *Id.* at 610 (emphasis added).

87. LAFAVE, *supra* note 33, § 6.6(a) n.29 ("Several other courts follow this three-point test.").

88. John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 533 (1999) ("In fact, [the *Mitchell* test] has been in existence for more than twenty years, but it has not been utilized in a majority of jurisdictions.").

89. *See Brigham City*, 547 U.S. at 402–04 (noting that, when discussing the subjective motivation requirement, "[o]ur cases have repeatedly rejected this approach").

90. *Id.* at 404 (alteration in original) (first emphasis added) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

91. *Brigham City*, 547 U.S. at 402–05.

92. *Id.* at 405.

Amendment, "no Warrants shall issue, but upon *probable cause*."[93] In 1967, the U.S. Supreme Court considered the probable cause element of the warrant requirement as it applied to administrative rather than criminal law.[94] In *Camara*, the appellant, Roland Camara, challenged the constitutionality of a San Francisco housing ordinance that authorized warrantless health and safety inspections of residential properties without probable cause to believe the housing code was being violated.[95] The Court held that these inspections "are significant intrusions upon the interests protected by the Fourth Amendment," and that they could not be conducted without a warrant.[96] The Court then examined "whether some other accommodation between public need and individual rights is essential" in these types of cases.[97]

The Court looked at what would constitute probable cause within the context of a code inspection.[98] Before 1967, the Fourth Amendment's "reasonableness clause had been used to excuse the absence of a warrant, but not the lack of probable cause."[99] After stating "reasonableness is still the ultimate standard," the Court held that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[100] Now, instead of probable cause making a search reasonable, reasonableness makes for probable cause.[101]

3. The Community Caretaking Exception

Community caretaking by itself is not an exception to the warrant requirement; rather, it is a description of what police do when they are

93. U.S. CONST. amend. IV (emphasis added).

94. Camara v. Mun. Court, 387 U.S. 523, 530 (1967) ("We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime.").

95. *Id.* at 525–27; Camara v. Mun. Court, 46 Cal. Rptr. 585 (Cal. Ct. App. 1965).

96. *Camara*, 387 U.S. at 534.

97. *Id.*

98. *Id.* at 535 ("In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.").

99. Robert Berkley Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 20 (1988).

100. *Camara*, 387 U.S. at 539.

101. *See* Harper, *supra* note 99, at 21.

not investigating crime.[102] Police regularly perform community caretaking activities to help people in danger, to preserve property, or to "create and maintain a feeling of security in the community."[103] Police also engage in community caretaking when they respond to noise complaints, mediate non-criminal disputes, assist the "ill or injured," "[take] lost property into their possession," remove abandoned property, or are called on to act as surrogates for a variety of society's usual caregivers.[104] A police officer's community caretaking activity becomes an exception to the warrant requirement if the officer has to perform a search in order to complete the caretaking activity.[105]

The U.S. Supreme Court first recognized this exception in *Cady v. Dombrowski*.[106] The Court held that searches made while performing community caretaking functions do not require warrants and are subject only to the reasonableness standard.[107] At the time, the Court focused on the "constitutional difference between houses and cars" when it ruled that automobile searches are a "partial exception" to the warrant requirement.[108] As initially conceived by the Court, the motives of the police engaged in community caretaking are supposed to be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[109] Since *Cady*, courts have expanded the exception to allow warrantless searches of homes despite mixed motives on the part of law enforcement.[110]

C. Community Caretaking Expands

In the years since the inception of the community caretaking exception, which was initially limited to searches of automobiles,[111] both

102. *See* Livingston, *supra* note 14, at 271–72.

103. *Id.* at 272 (quoting STANDARDS FOR CRIMINAL JUSTICE § 1-2.2 (1980)).

104. Livingston, *supra* note 14, at 272.

105. For example, an officer checking on a sleeping motorist at the side of the road may discover a gun at the motorist's feet. People v. Murray, 560 N.E.2d 309, 310 (Ill. 1990); *see also infra* Part II.C.

106. *See supra* notes 1–6, 11–12 and accompanying text.

107. Cady v. Dombrowski, 413 U.S. 433, 447–48 (1973).

108. *Id.* at 439 ("Although vehicles are 'effects' within the meaning of the Fourth Amendment, 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.'" (quoting Chambers v. Maroney, 399 U.S. 42, 52 (1970))).

109. *Cady*, 413 U.S. at 441.

110. *See, e.g.*, State v. Pinkard, 2010 WI 81, ¶¶ 16–27, 327 Wis. 2d 346, 785 N.W.2d 592, *cert. denied*, 131 S. Ct. 1001 (2011).

111. *Cady*, 413 U.S. at 441–43, 447–48.

federal circuit and state supreme courts have expanded the community caretaking exception to allow the warrantless searches of homes.[112] At least one court has also expanded the motives allowed by police for the community caretaking searches and now allows for mixed motives or pretextual community caretaking.[113] The discussion that follows examines, in chronological order, the cases that led the various courts to expand the exception. This Comment will first look at the federal courts.

1. Federal Circuits

Three federal circuits, the Sixth Circuit in 1996, the Fourth Circuit in 2001, and the Eighth Circuit in 2006, have expanded the community caretaking exception.

a. Sixth Circuit

In the pre-dawn hours of May 22, 1994, two Canton, Ohio, police officers were investigating a loud noise complaint at the home of Donald Rohrig.[114] The officers entered the home through an unlocked door after receiving no answer when they knocked on the door and tapped on all the first floor windows.[115] During their efforts to locate Rohrig, they discovered a sophisticated marijuana grow operation in the basement.[116] Rohrig, facing federal drug charges, moved to suppress the evidence on the basis that the officers violated his Fourth Amendment rights when they entered his home without a warrant.[117] When the Sixth Circuit heard his appeal, the court held that the warrantless entry of a residence was justified under the community caretaking exception.[118] The court was "simply unable to identify any unreasonable conduct on the part of the . . . officers,"[119] and concluded that the government's interest in quieting the loud music was sufficient to justify the warrantless entry of Rohrig's home.[120]

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112. *See, e.g.*, United States v. Rohrig, 98 F.3d 1506, 1509 (6th Cir. 1996); State v. Alexander, 721 A.2d 275, 286–87 (Md. Ct. Spec. App. 1998).

113. *See infra* Part II.C.2.e; *infra* notes 264–68 and accompanying text.

114. *See Rohrig*, 98 F.3d at 1509.

115. *Id.*

116. *Id.*

117. *Id.* at 1510.

118. *Id.* at 1523.

119. *Id.* at 1524.

120. *Id.* at 1522.

In a more recent case, the Sixth Circuit reined in the expansion somewhat by maintaining *Cady*'s distinction between law enforcement and community caretaking, and noting: "The community caretaking function of the police cannot apply where . . . there is significant suspicion of criminal activity."[121]

b. Fourth Circuit

In 1999, Officer Michael Peddle, based partially on lies told to him by a detective who had been attempting to serve Britt Phillips with a subpoena, entered Britt Phillip's home through an open front door to check on his welfare.[122] Phillips brought a § 1983 action[123] against Peddle alleging that Peddle violated his Fourth Amendment rights when Peddle entered his home.[124] Affirming the district court's grant of summary judgment against Phillips, the Fourth Circuit found that "Peddle did not violate any clearly established law when he entered the home" because he "was acting under the aegis of the community caretaker doctrine."[125] The court reasoned that Peddle's warrantless home entry was allowable because neither the U.S. Supreme Court nor the Virginia Supreme Court have "established law refuting the applicability of the community caretaker doctrine to an entry into a residence."[126] The Fourth Circuit, relying heavily on precedent from the Sixth Circuit and the Virginia Court of Appeals, preserved, as those courts did, the totally divorced standard from *Cady*.[127]

In 2009, the Fourth Circuit clarified its community caretaking jurisprudence in *Hunsberger v. Wood* when it explained that community caretaking "is in no sense an open-ended grant of discretion that will justify a warrantless search whenever an officer can point to some

121. United States v. Williams, 354 F.3d 497, 507–08 (6th Cir. 2003) (expressing concern over the purity of DEA agents' motives for investigating a water leak in an apartment where sparse furniture, smells, and small leaves had been reported).

122. Phillips v. Peddle, 7 F. App'x 175, 176–77 (4th Cir. 2001) ("Although some of the facts that Detective Russell presented were untrue, this was the scene that Detective Russell presented to Officer Peddle.").

123. 42 U.S.C. § 1983 (2006).

124. *Phillips*, 7 F. App'x at 177.

125. *Id.* at 177–78, 180.

126. *Id*. at 179–80.

127. *See id.* at 178–80 (citing United States v. Rohrig, 98 F.3d 1506, 1509 (6th Cir. 1996); Wood v. Commonwealth (*Wood II*), 497 S.E.2d 484, 487 (Va. Ct. App. 1998) (en banc); Commonwealth v. Waters, 456 S.E.2d 527, 529–30 (Va. Ct. App. 1995)).

interest unrelated to the detection of crime."[128] In *Hunsberger*, police entered a home without a warrant to search for a missing minor and suspected vandals because neighbors mistakenly thought the homeowners were on vacation.[129] In a subsequent § 1983 action,[130] the court held that the community caretaking exception did not apply to the search because the police were not following "a standard policy that could be classified as community caretaking."[131] Because community caretaking focuses on functions more than circumstances, the court wanted to see a programmatic basis for an officer's actions, "such as the policy of locating weapons in towed cars in *Dombrowski*."[132] In the Fourth Circuit, although community caretaking functions allow police into homes without a warrant, those functions must be policy driven and separate from crime detection and investigation.[133]

c. Eighth Circuit

In *U.S. v. Quezada*, the Eighth Circuit held that a sheriff's deputy attempting to serve papers was acting as a community caretaker when he entered Tiffany Giannone's apartment without a warrant and discovered Giannone's houseguest on the floor sleeping on top of a shotgun.[134] The deputy had knocked on the door, which, because it was unlatched, opened a bit.[135] Through the opening, the deputy could see a light and hear a television.[136] He announced his presence and received no answer.[137] He entered the apartment with his weapon drawn, whereupon he saw a pair of legs on the floor, protruding from the

128. Hunsberger v. Wood, 570 F.3d 546, 554 (4th Cir. 2009). The court also distinguished community caretaking from the emergency aid doctrine: "The community caretaking doctrine requires a court to look at the *function* performed by a police officer, while the emergency exception requires an analysis of the *circumstances* to determine whether an emergency requiring immediate action existed. Thus, as the district court noted, the doctrines have different 'intellectual underpinning[s].'" *Id.* (alteration in original) (quoting Hunsberger v. Wood, 564 F. Supp. 2d 559, 567 (W.D. Va. 2008), *rev'd*, 570 F.3d 546 (4th Cir. 2009)).

129. *Hunsberger*, 570 F.3d at 549–51.

130. *Id.* at 552; *see also* 42 U.S.C. § 1983 (2006).

131. *Hunsberger*, 570 F.3d at 554.

132. *Id.*

133. *See id.*

134. United States v. Quezada, 448 F.3d 1005, 1006 (8th Cir. 2006).

135. *Id.*

136. *Id.*

137. *Id.*

bedroom.[138] The legs belonged to the defendant, Christopher Quezada, who was arrested for being a felon in possession of a firearm—the shotgun upon which he was sleeping.[139] In allowing the search, the court held "[a] police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention."[140] The court noted concerns about officers using their caretaking responsibilities as pretext to gain entry to a home but found those concerns could be addressed by the emergency nature of this exception, although it did not decide the issue.[141]

2. State Courts

An increasing number of state courts, some following the lead of the federal circuits, and others following the lead of other states before them, have expanded the community caretaking exception to allow for the warrantless entry of homes.

a. Maryland

On Thanksgiving Day 1997, a Calvert County sheriff's deputy responded to an anonymous call about an open basement door at Carol and James Alexander's home.[142] Although there were "no signs of a forcible entry" and the family dog started barking only after the deputy knocked on the door, the deputy and a backup entered the basement and found it in "disarray."[143] While searching the rest of the home for "possible intruders," the deputies discovered some marijuana—in what they claimed was in plain view[144]—on a shelf in a walk-in closet of the

138. *Id.*

139. *Id.* at 1006–07.

140. *Id.* at 1007 (citing Mincey v. Arizona, 437 U.S. 385, 392–93 (1978)).

141. *Quezada*, 448 F.3d at 1007–08 ("But we do not have to decide the legal relevance, if any, that the subjective intent of the officer in the present case might have because the district court found on an ample record that Deputy Ruth entered the apartment to investigate a possible emergency situation.").

142. State v. Alexander, 721 A.2d 275, 276–77 (Md. Ct. Spec. App. 1998).

143. *Id.* at 278.

144. *Id.* The court did not question that the marijuana was in plain view. *Id.* at 287 ("It was only when looking into a walk-in closet in the master bedroom, a place where an intruder could well have been hiding, that the officers saw marijuana on a shelf in plain view."). The court further asserts that "[t]here was saliently missing from the circumstances of this case *any possibility that the two officers were engaging in any sort of a subterfuge*." *Id.* (emphasis added). However, an argument can be made that the evidence was not truly in plain sight if officers could only have discovered the evidence after making their way from the basement to

master bedroom.[145] In deciding the case, the Maryland Court of Special Appeals first established that reasonableness, not probable cause, was the standard by which to judge such entries.[146] In so doing, the court expanded community caretaking to allow for warrantless home entries and subsequently found that "[w]hat the officers did in this case was the quintessence of the reasonable performance of their community caretaking function."[147]

b. Virginia

In 1994, the Virginia Court of Appeals first recognized the community caretaking exception from *Cady*.[148] A year later, in *Commonwealth v. Waters*, the court clarified that the exception was not limited to automobiles.[149] Although the defendant in *Waters* was searched on the street, the door to warrantless home searches was opened.[150] In 1997, the court walked through that door in *Wood v. Commonwealth* (*Wood I*) when it applied "the community caretaker doctrine to justify the warrantless entry into and investigative search of the second floor of [Wood's] home."[151] While the court found that "little, if any, distinction exists in Virginia law between the circumstances governing the application of the community caretaker doctrine and those governing the application of the 'emergency' exception," it did treat the exceptions separately and thus does not limit the application of community caretaking to emergency situations.[152]

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the master bedroom and opening the closet door. *See id.*

145. *Id.*

146. *Id.* at 284–85 ("When the police cross a threshold not in their criminal investigatory capacity but as part of their community caretaking function, it is clear that the standard for assessing the Fourth Amendment propriety of such conduct is whether they possessed a reasonable basis for doing what they did.").

147. *Id.* at 287.

148. Barrett v. Commonwealth, 447 S.E.2d 243, 245 (Va. Ct. App. 1994) (en banc) ("Citing *Cady v. Dombrowski*, the Commonwealth argues that officers may conduct investigative seizures in the routine execution of community caretaking functions, totally divorced from the detection or investigation of crime, so long as those seizures are reasonable. We agree." (citations omitted)), *rev'd on other grounds*, 462 S.E.2d 109 (Va. 1995).

149. Commonwealth v. Waters, 456 S.E.2d 527, 530 (Va. Ct. App. 1995) (noting that "no language in *Barrett* or *Cady* restricts an officer's community caretaking actions to incidents involving automobiles").

150. *Id.* at 528–30.

151. *See* Wood v. Commonwealth (*Wood I*), 484 S.E.2d 627, 630 (Va. Ct. App. 1997), *rev'd*, 497 S.E.2d 484 (Va. Ct. App. 1998) (en banc).

152. *See Wood I*, 484 S.E.2d at 630–31.

Under the community caretaking exception, "[a]n officer may take appropriate action . . . where the officer maintains a reasonable and articulable suspicion . . . that such action is necessary."[153] The court reversed its decision a year later, but the majority did not explicitly hold that the community caretaking doctrine could not apply to warrantless home entry, merely that it did not apply given the facts of that case.[154] One thing that the court was absolutely clear on in the *Wood II* decision was that it was maintaining the totally divorced standard from *Cady*.[155]

c. California

On Christmas Day 1996, Richmond, California, police officers were called to the home of Andre Ray because its door had been "open all day," and the home was "a shambles inside."[156] Although the door was open only two feet and "there were no signs of forced entry," the officers entered the home, where they discovered a large quantity of cocaine and money.[157] Citing, *inter alia*, *State v. Alexander*,[158] the Supreme Court of California affirmed the court of appeal and expanded the community caretaking exception in California.[159] However, the court placed some limits on the expansion[160]: (1) officers' search of the home must be "narrowly delimited by the known facts" that gave rise to the entry,[161] and (2) trial courts must judge officers' credibility and

153. *Id.* at 631.

154. *Wood II*, 497 S.E.2d 484, 487 (Va. Ct. App. 1998) (en banc) ("We, therefore, hold that the warrantless entry by the officers into the second floor of Wood's residence was not justified by any 'community caretaker' function. . . . Nothing in this record supports an extension of its application to a warrantless intrusion into Wood's upstairs bedroom under the circumstances proved in this record."). This was also enough to convince the Fourth Circuit, which relied on this holding when it expanded the community caretaking exception. *See supra* note 127 and accompanying text.

155. *Wood II*, 497 S.E.2d at 487 ("[O]n these facts, the officers' intrusion into the room on the second floor of the home was not totally divorced from investigating criminal activity and acquiring evidence and, therefore, could not be considered a caretaking function."); *see also* Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

156. People v. Ray, 981 P.2d 928, 931 (Cal. 1999).

157. *Id.* at 931–32.

158. *Id.* at 935–36 ("For present purposes, *State v. Alexander* is particularly instructive." (citation omitted)).

159. *Id.* at 931 (holding that under the community caretaking exception, "officers acted reasonably to protect the safety and security of persons and property when they briefly entered defendant's residence without a warrant").

160. *Id.* at 937 ("In adopting a community caretaking exception, we emphasize two aspects critical to maintaining the essential constitutional balance.").

161. *Id.*

motivations when evaluating the reasonableness of the entry.[162] With the second limit, the court clearly preserves *Cady*'s totally divorced standard.[163]

d. South Dakota

On April 27, 2007, a Sioux Falls, South Dakota, police officer responded to a call from the local gas utility concerning possible theft of natural gas in a residential neighborhood.[164] When the officer approached the home from which the utility suspected gas was being stolen, he observed what he considered to be a "wide open, unsecured house": the front glass storm door was closed and unlocked, but the main door behind it was open.[165] He could detect a faint smell of ammonia, and a neighbor informed him that the occupant of the home had been "caught at Kmart buying Sudafed."[166] After a backup officer arrived, the two officers entered the home "to check to make sure nobody was incapacitated inside."[167] The officers found no one in the home but did discover evidence that methamphetamine was being manufactured there.[168] The officers left the home, obtained and executed a search warrant, and arrested the homeowner, Brian Deneui.[169] In *Deneui*, the Supreme Court of South Dakota noted, "[H]omes cannot be arbitrarily isolated from the community caretaking equation," and held that the exception could justify the warrantless search of a home.[170] However, the court preserved the totally divorced standard[171] and distinguished the community caretaking exception from the emergency doctrine, which it observed "implicate[s] . . . *actual*

162. *Id.* at 938 ("[T]he trial courts play a vital gatekeeper role, judging not only the credibility of the officers' testimony but of their motivations.").

163. *Id.* ("Any intention of engaging in crime-solving activities will defeat the community caretaking exception even in cases of mixed motives."); *see also* Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

164. State v. Deneui, 775 N.W.2d 221, 226–27 (S.D. 2009).

165. *Id.* at 227.

166. *Id.* Despite these clues, the court was convinced that officers "did not suspect a methamphetamine lab until after [they were] inside the residence." *Id.* at 231.

167. *Id.* at 227–28.

168. *Id.* at 228.

169. *Id.*

170. *Id.* at 239.

171. *Id.* ("[T]he police action must be apart from the detection, investigation, or acquisition of criminal evidence; and the officer should be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.").

emergencies."[172]

e. Wisconsin

In 2010, relying on some of the decisions above for justification,[173] Wisconsin expanded the community caretaking exception to allow for the warrantless searching of homes in the *Pinkard* case.[174] The Wisconsin Supreme Court adopted a three-step test for this exception:

> [T]he circuit court must determine: (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a *bona fide* community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.[175]

One might think that the second prong's "bona fide" requirement maintains the totally divorced standard, but it does not.[176] It simply means "officers must be able to articulate an objectively reasonable belief that entry into the home is necessary to prevent harm."[177] Wisconsin law enforcement officers may have mixed motives for a community caretaking search as long as the motive to protect and render assistance is "paramount."[178] The third prong is evaluated by balancing public interest in the search against the "intrusion on the citizen's constitutional interest."[179] Although one of the factors balanced was exigency,[180] the court was careful not to confuse the emergency

172. *Deneui*, 775 N.W.2d at 239 (emphasis added).

173. State v. Pinkard, 2010 WI 81, ¶ 20 n.6, 327 Wis. 2d 346, 785 N.W.2d 592 (relying on, *inter alia*, *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996), *People v. Ray*, 981 P.2d 928 (Cal. 1999), and *Commonwealth v. Waters*, 456 S.E.2d 527 (Va. Ct. App. 1995) to support its holding that community caretaking was not limited to automobiles), *cert. denied*, 131 S. Ct. 1001 (2011).

174. *Pinkard*, 2010 WI 81, ¶¶ 26–28.

175. *Pinkard*, 2010 WI 81, ¶ 29 (emphasis added) (citing State v. Kramer, 2009 WI 14, ¶ 21, 315 Wis. 2d 414, 759 N.W.2d 598).

176. *See Pinkard*, 2010 WI 81, ¶ 40 ("[C]ommunity caretaker and law enforcement functions 'are not mutually exclusive.'" (quoting *Kramer*, 2009 WI 14, ¶ 39)); Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

177. *Pinkard,* 2010 WI 81, ¶ 78 (Bradley, J., dissenting).

178. *Kramer*, 2009 WI 14, ¶ 35.

179. *Pinkard*, 2010 WI 81, ¶ 41 (citing *Kramer*, 2009 WI 14, ¶ 40).

180. *Pinkard*, 2010 WI 81, ¶ 42.

doctrine with the community caretaking exception.[181] "The community caretak[ing] exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement."[182]

Wisconsin's courts are still sorting out the boundaries of the community caretaking exception. The court of appeals considers the three-step test adopted by the Wisconsin Supreme Court to signify that "warrantless entry into a residence is subjected to stricter scrutiny."[183] In *State v. Ultsch*, the court of appeals used that stricter scrutiny standard to hold that officers were not acting as community caretakers when they entered a home without a warrant looking for a suspected drunk driver after finding her damaged car at the end of her driveway.[184] While a promising development, this holding did not stop officers from entering Juan Gracia's home under similar circumstances.[185] In that case, the Wisconsin Supreme Court held that the community caretaking exception applied to the officers' entry of Gracia's bedroom after Gracia had told the officers to "go away."[186]

3. U.S. Supreme Court

The U.S. Supreme Court recognized the exception in *Cady*, but has yet to endorse the elimination of the totally divorced standard or the expansion from automobiles to private homes.[187]

III. ANALYSIS

In 1973, when the community caretaking exception was first recognized, it was limited to automobiles.[188] Since then, the Supreme

181. *Id.* ¶ 26 n.8 ("We have consistently maintained the appropriate distinction between the two exceptions . . . .").

182. *Id.*

183. State v. Ultsch, 2011 WI App 17, ¶ 18, 331 Wis. 2d 242, 793 N.W.2d 505.

184. *Id.* ¶¶ 2–5, 30.

185. State v. Gracia, 2013 WI 15, ¶ 21, 345 Wis. 2d 488, 826 N.W.2d 87 ("[S]ome of the facts here appear similar to those in *Ultsch* . . . .").

186. *Id.* at ¶¶ 28–29.

187. *Pinkard*, 2010 WI 81, ¶ 98 (Bradley, J., dissenting) ("It is noteworthy that the United States Supreme Court has never extended the community caretaker exception to justify a warrantless entry of a home."), *cert. denied*, 131 S. Ct. 1001 (2011); Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

188. *See supra* note 16 and accompanying text.

Court has not spoken on expanding the exception to homes.[189] Meanwhile, courts have fallen like dominoes as the expansion of community caretaking has spread through American jurisprudence. In 1996, the Sixth Circuit expanded the exception.[190] In 1998, two states expanded the exception: Virginia in March,[191] followed by Maryland in December.[192] The Fourth Circuit, citing the decisions made in the Sixth Circuit and Virginia, expanded community caretaking in 2001.[193] That same year, California, following Maryland's example, expanded the exception.[194] The Eighth Circuit expanded the exception in 2006,[195] followed by South Dakota in 2009.[196] Finally, in 2010, Wisconsin, citing the examples of the Sixth Circuit, Virginia, and California, expanded the community caretaking exception to cover warrantless home searches.[197]

Where expansion of the community caretaking exception to homes has occurred, it has happened quite rapidly. In Wisconsin, for example, while the explicit expansion into homes did not occur until the *Pinkard* case thirty-seven years after the *Cady* decision,[198] the majority in *Pinkard* relied on the decision in *Bies v. State*, which laid the groundwork for the home expansion *only ten years after* the *Cady* decision.[199] In the Commonwealth of Virginia, the community caretaking doctrine was not used until 1994, but once recognized, it took *only four years* for a court to use it to justify a warrantless home entry.[200]

Not only have these expansions happened quickly, but it also seems as if further expansion is inevitable. The Ninth Circuit, which initially limited the doctrine to automobiles, recently signaled that it may be

189. *See supra* note 187.

190. *See supra* notes 112, 118 and accompanying text.

191. *See supra* notes 142, 147 and accompanying text.

192. *See supra* notes 122, 127 and accompanying text.

193. *See supra* notes 148–55 and accompanying text.

194. *See supra* notes 127, 158–59 and accompanying text.

195. *See supra* notes 134, 140 and accompanying text.

196. *See supra* notes 164, 170–72 and accompanying text.

197. *See supra* note 173 and accompanying text.

198. *See supra* note 173 and accompanying text.

199. Pinkard, 2010 WI 81, ¶ 22 ("While *Bies* did not explicitly state that a bona fide community caretaker function may support a warrantless home entry, it necessarily implies such an interpretation."); Bies v. State, 76 Wis. 2d 457, 251 N.W.2d 461 (1977). In *Bies*, an officer investigating reports of noise in an alley observed, through an open door to a garage, what he believed to be stolen goods. *Bies*, 76 Wis. 2d at 460–62. The majority in *Pinkard* notes that this warrantless entry of the curtilage of the residence implies that a warrantless entry of the home is allowed. *Pinkard*, 2010 WI 81, ¶ 22.

200. *See supra* notes 148–55 and accompanying text.

moving toward expansion.[201] This rapid and growing expansion threatens to erode Fourth Amendment rights. To counter this threat, this expansion must be stopped and reversed.

Part III.A explains that the emergency doctrine is robust enough to allow police to enter people's homes when help is truly needed. Part III.B shows that mere exigency cannot overcome the protections guaranteed to people in their homes. Part III.C analyzes why warrants prove to be an unworkable solution to this problem. Finally, Part III.D calls for the Supreme Court to roll back the expansion of the community caretaking exception by applying the recently revived "physical intrusion" standard.

A. Community Caretaking in Homes Is Not Needed Because of the Emergency Doctrine

Unquestionably, law enforcement may enter a home to render assistance in a true emergency.[202] That principle is the very essence of the emergency doctrine, perhaps best expressed in 1963, by then-Judge Warren Burger:

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.[203]

While community caretaking often involves some exigency, it usually does not involve the urgency required in emergency situations.[204] Some courts separate exigency and emergency, reserving the emergency

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201. Although the Ninth Circuit in *United States v. Erickson* held that the community caretaking function "cannot itself justify a warrantless search of a private residence," *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993), a more recent decision points in a different direction, *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005) (explaining that police acting as community caretakers responding to "perceived emergenc[ies]" could enter a residence without a warrant). This opinion is shared by the Fourth Circuit, which recently interpreted *Stafford* as allowing warrantless searches of homes under the community caretaking doctrine: "[S]ome lower courts have relied on the community caretaking rationale in upholding warrantless searches of homes." Hunsberger v. Wood, 570 F.3d 546, 553 (4th Cir. 2009).

202. Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("We do not question the right of the police to respond to emergency situations.").

203. Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963).

204. *See supra* notes 103–04 and accompanying text.

doctrine for "actual emergencies," whereas other courts have been confused on this point, sometimes conflating the two.[205] For example, in 2012, the Supreme Court of Ohio referred to the "community-caretaking/emergency-aid exception to the Fourth Amendment warrant requirement,"[206] and in 2013, the New Jersey Supreme Court granted a motion for appeal to bring clarity to "state case law [that had] blurred the distinction between the community-caretaking and emergency-aid doctrines."[207] Other courts graft the emergency doctrine onto the community caretaking exception by applying the *Mitchell* test to limit the exception to emergency situations.[208] New Mexico's history with the community caretaker exception brings some clarity to this mess and shows that when the emergency doctrine is properly applied, the community caretaking exception does not need to be expanded to homes.[209]

In 2001, the New Mexico Court of Appeals referred to "community caretaking" and "emergency aid" as "different characterizations . . . essentially of the same activity."[210] Initially, the

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205. *See supra* note 172 and accompanying text.

206. State v. Dunn, 964 N.E.2d 1037, 1042 (Ohio 2012). In the same case, the court implies that "community caretaking," "exigent circumstances," and "emergency" are similar, if not the same:

> In *State v. Applegate*, this court upheld a warrantless entry into a residence by police officers who, while responding to a report of domestic violence, heard sounds coming from inside the residence indicative of violence. Although we did not use the term "community caretaking," but rather "exigent circumstances," we held that the warrantless entry was certainly justified by the officers' reasonable belief that entering the residence was necessary to investigate an emergency threatening life and limb.

Id. at 1041–42. (citation omitted). The court further conflates community caretaking and the emergency doctrine by claiming that the U.S. Supreme Court addressed the community caretaking exception in *Mincey v. Arizona*, which is actually the case that gave rise to the emergency doctrine. *Id.* at 1041 ("The United States Supreme Court further elaborated on the community-caretaking exception to the Fourth Amendment warrant requirement in *Mincey v. Arizona* . . . ."); *see also* Mincey v. Arizona, 437 U.S. 385, 395 (1978); Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 AM. J. CRIM. L. 325, 331 (1999) ("In *Mincey v. Arizona*, the Supreme Court recognized an exception to the warrant requirement for emergencies.").

207. State v. Vargas, 63 A.3d 175, 188 (N.J. 2013) (rejecting an expansion of the community caretaking exception to allow warrantless searches of homes).

208. *See* Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1503–04 (2009). For an explanation of the *Mitchell* test, see *supra* notes 84–86 and accompanying text.

209. *See infra* notes 211–16 and accompanying text.

210. State v. Nemeth, 23 P.3d 936, 943 (N.M. Ct. App. 2001), *overruled by* State v. Ryon,

court held that the community caretaking function "can properly take its place in our jurisprudence as an exception to the Fourth Amendment warrant requirement."[211] The court allowed for warrantless searches of a home under the community caretaking exception as long as police officers' actions are "objectively reasonable" and officers are "not engaged in crime-solving activities."[212] Although the court of appeals signaled a cautious approach to the expansion,[213] the New Mexico Supreme Court rolled it back just four years later.[214] The court was concerned that "*Nemeth* does not convey the urgency required to make a warrantless intrusion into a home, *even to provide emergency assistance*, reasonable."[215]

The court distinguished between the emergency doctrine, which it held applies to personal residences, and "[t]he *Cady* community caretaker or public servant doctrine," which it held applied primarily to vehicles.[216] It rejected community caretaking as a basis to enter a home without a warrant and held that police "may [only] enter a home without a warrant or consent pursuant to the emergency assistance doctrine."[217] The court also held that officers' "actions must be in good faith . . . for a purpose consistent with community caretaking, rather than as a pretext for investigating criminal activity or searching for incriminating evidence" and adopted the *Mitchell* test for evaluating such entries.[218]

Courts truly seeking to limit warrantless home searches to emergency situations would do well to follow the lead of the New Mexico Supreme Court. Such searches should be evaluated using the emergency aid doctrine—not community caretaking—because "only a genuine emergency will justify entering and searching a home without a

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108 P.3d 1032 (N.M. 2005).

211. *Nemeth*, 23 P.3d at 944.

212. *Id.*

213. *Id.* at 945 ("[L]aw enforcement officials have no carte blanche to enter homes to investigate circumstances of suspected criminal activity under a guise or pretext of community caretaking pursuits.").

214. State v. Ryon, 108 P.3d 1032, 1041–42 (N.M. 2005) ("The decision in *Nemeth* to conflate the emergency assistance doctrine with the broader community caretaker exception and hold that officers were merely performing a welfare check or 'public service' is understandable, but we are not persuaded the decision is appropriate.").

215. *Id.* at 1041 (emphasis added).

216. *Id.* at 1043.

217. *Id.* at 1048.

218. *Id.* at 1044.

warrant and without consent or knowledge."[219] As this Comment examines below, anything less is not sufficient to guard that which stands at the core of people's Fourth Amendment rights—their homes.[220]

B. Non-Emergency Exigencies Cannot Overcome the Protection Afforded to Homes

An exception founded on the "constitutional difference between houses and [automobiles]"[221] should not now be used to justify warrantless entry into homes, which are "accorded the full range of Fourth Amendment protections."[222] "[The] physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ."[223] Accordingly, when "officers are not responding to an emergency," searching a home without a warrant requires "compelling reasons" and "exceptional circumstances."[224] Unlike homes, automobiles have an "ambulatory character" and "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home."[225] Thus, people have a "lesser expectation of privacy in an automobile than in [a] home,"[226] where they have the greatest expectation of privacy.[227] However, this distinction seems to be lost on jurisdictions where the community caretaking exception is not limited to emergency situations.[228]

Warrantless searches in those jurisdictions are justified with a blend

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219. *Id.* at 1043 (citing Mincey v. Arizona, 437 U.S. 385, 392 (1978)).

220. Silverman v. United States, 365 U.S. 505, 511 (1961).

221. Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (quoting Chambers v. Maroney, 399 U.S. 42, 52 (1970)).

222. Lewis v. United States, 385 U.S. 206, 211 (1966).

223. United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

224. McDonald v. United States, 335 U.S. 451, 454 (1948).

225. *Cady*, 413 U.S. at 441–42.

226. State v. Pinkard, 2010 WI 81, ¶ 56, 327 Wis. 2d 346, 785 N.W.2d 592 (quoting State v. Anderson, 142 Wis. 2d 162, 169 n.4, 417 N.W.2d 411, 414 n.4 (Ct. App. 1987) (internal quotation marks omitted)), *cert. denied*, 131 S. Ct. 1001 (2011).

227. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals."); Payton v. New York, 445 U.S. 573, 589 (1980) ("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."); Gooding v. United States, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting) ("[T]here is no expectation of privacy more . . . demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes . . . .").

228. *See infra* notes 229–35 and accompanying text.

of exigency[229] and reasonableness, which should not be sufficient to overcome the heightened constitutional protections that people enjoy in their homes.[230] In California, community caretaking searches must be prompted by exigency, but law enforcement's actions are judged against the malleable reasonableness standard.[231] In Wisconsin, the reasonableness of officers' exercise of their community caretaking function is determined with a balancing test that considers, among other things, exigency.[232] In Maryland, the exigency required is that law enforcement must be protecting people, property, or both.[233] The standard for evaluating officers' actions is "whether they possessed a reasonable basis for doing what they did."[234] These standards offer the promise of sufficient protection, but they are often used to justify a search when circumstances are, in reality, less than exigent.[235]

Consider, for example, *Pinkard*, the case Wisconsin used to expand community caretaking, where police received a report that the occupants of a home were sleeping near illegal drugs, but officers had no indication that the occupants were in need of medical attention or other assistance.[236] If the police were concerned for the occupants, that concern was not reflected in their actions; the police gang unit, not an ambulance, was dispatched to check on the occupants.[237] It was not until the Wisconsin Supreme Court heard the case that the concern that the occupants might be suffering a drug overdose was discussed as a possible exigency—raised not by the police but by the court.[238] In a more egregious example, one law enforcement officer lied to another to

229. Recall that the exigencies discussed here are not the same as the exigencies in a situation where a crime is being investigated. That "exigent circumstances" exception is a separate issue from community caretaking. *See supra* note 80 and accompanying text.

230. *See supra* note 51 and accompanying text.

231. *See supra* Part II.C.2.c. This combination of lower standards makes the exception subject to abuse by law enforcement. *See* Jennifer Fink, Note, People v. Ray: *The Fourth Amendment and the Community Caretaking Exception*, 35 U.S.F. L. Rev. 135, 152 (2000) ("The Fourth Amendment's warrant requirement is intended to curb the potential for abuses of discretion by police officers, and the community caretaking exception will likely defeat this critical purpose when applied in the context of a private residence.").

232. *See supra* notes 173–82 and accompanying text.

233. State v. Alexander, 721 A.2d 275, 284 (Md. Ct. Spec. App. 1998).

234. *Id.* at 285.

235. *See, e.g.*, United States v. Quezada, 448 F.3d 1005, 1006–08 (8th Cir. 2006).

236. *See supra* notes 17–20 and accompanying text.

237. *See supra* note 19 and accompanying text.

238. State v. Pinkard, 2010 WI 81, ¶¶ 90–91, 327 Wis. 2d 346, 785 N.W.2d 592 (Bradley, J., dissenting), *cert. denied*, 131 S. Ct. 1001 (2011).

create the exigent circumstances later used to justify the search that served as the basis for expanding the exception for the Fourth Circuit.[239] In the Third Circuit, the standard itself has a low threshold—the "modified exigent circumstances test."[240] In practice, the exigency and reasonableness standards simply do not provide a level of protection appropriate to homes.

C. Community Caretaking Warrants Are Not a Workable Solution

Community caretaking warrants are a recently proposed solution to the problem of the expanding community caretaking exception.[241] These warrants would be based on administrative warrants,[242] which are used for health and safety inspections and are issued using a reasonableness standard.[243] At first blush, this proposal seems to make sense. Both the community caretaking exception and administrative warrants came about because the courts perceived a need for law enforcement to enter homes for reasons apart from crime investigation.[244] However, deeper analysis reveals that warrants are not a workable solution to the problem of the community caretaking expansion: Warrants would be unnecessary in emergencies, their nature is incompatible with the concept of community caretaking, and they could lead to police performing traditional searches without showing probable cause.

In jurisdictions that combine the emergency doctrine with community caretaking,[245] or limit the exception to emergencies,[246] community caretaking warrants would serve no purpose because the emergency doctrine is itself an exception to the warrant requirement.[247] It is well established that law enforcement officers can enter homes to

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239. *See supra* Part II.C.1.b.

240. Ray v. Twp. of Warren, 626 F.3d 170, 176 (3d Cir. 2010). Courts do not rely on the community caretaking doctrine per se, but "instead apply what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role." *Id.*

241. *See* Marinos, *supra* note 28, at 284–89 (proposing a "community caretaking warrant" as a solution to "unreasonable police intrusions").

242. *Id.*

243. *See supra* Part II.B.2.

244. *See supra* Part II.B.2 (explaining the development of administrative warrants to allow agents to enter a home to perform health and safety inspections); *supra* Part II.B.3 (explaining the development of the community caretaking exception that allowed police to enter a home to protect people and property).

245. *See supra* note 206 and accompanying text.

246. *See supra* note 172 and accompanying text.

247. *See supra* Part II.B.1.

give emergency aid or to prevent *imminent* harm.[248] In such cases, a warrant requirement defies common sense: If the officers can wait for a warrant, the situation is not an emergency.[249] But, even in jurisdictions where community caretaking is kept distinct from the emergency doctrine, warrants are not a workable solution.

Considering first the nature of warrants, this Comment finds it incompatible with the concept of community caretaking. While administrative warrants are not used to investigate crimes per se, their purpose is to seek out violations of the law.[250] For example, in *Camara*, inspectors were seeking entry to a home to search for violations of San Francisco's housing code.[251] Administrative warrants are undeniably investigatory in nature and thus contrary to the concept of community caretaking, which, as the name implies, is about taking care of people and property and not about investigating crime.[252] The community caretaking expansion is a problem that needs fixing, but warrants are not the right tool for the job.

Even if one were to look past this incompatibility and, *arguendo*, choose the wrong tool for the right job, there is a larger concern. The lower standard required for the issuance of these warrants,[253] coupled with the lack of analysis of officers' subjective intent[254] and a tolerance of pretext in the courts,[255] could allow the police to use these proposed

248. *See supra* note 78 and accompanying text.

249. This concept further illustrates the point that community caretaking does not need to be expanded to homes to cover emergency situations and underscores the wisdom of the New Mexico Supreme Court, which distinguished between community caretaking and the emergency doctrine. *See supra* notes 210–18 and accompanying text.

250. *See supra* Part II.B.2.

251. Camara v. Mun. Court, 387 U.S. 523, 525–26 (1967).

252. While some courts may have blurred *Cady*'s totally divorced standard, it remains at the heart of the exception. *See supra* notes 121, 127, 171 and accompanying text.

253. *See supra* notes 242–43 and accompanying text.

254. The Supreme Court has consistently refused to consider the relevancy of officers' subjective motivations. "Our cases have repeatedly rejected this approach. An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.'" Brigham City v. Stuart, 547 U.S. 398, 404 (2006) (alteration in original) (quoting Scott v. United States*,* 436 U.S. 128, 138 (1978)). "The officer's subjective motivation is irrelevant." *Brigham City*, 547 U.S. at 404 (citing Bond v. United States*,* 529 U.S. 334, 338 n.2 (2000)). Particularly relevant to a discussion on community caretaking is this quote from the same case: "It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence." *Brigham City*, 547 U.S. at 405.

255. *See supra* notes 236–39 and accompanying text.

warrants to investigate without probable cause. Like criminal search warrants, administrative warrants are issued to allow agents into people's homes, but a reasonableness standard takes the place of the higher standard of probable cause.[256] Under a community caretaking warrant, if the need to enter the home to render aid outweighed the invasion caused by entering the home, then the search would be considered reasonable and the warrant would be granted.[257] This standard for issuance sounds innocuous, but it could easily be subject to abuse, especially in jurisdictions that do not preserve the totally divorced standard from *Cady*.[258] Under a community caretaking warrant, it is the officers' community caretaking motive and *not* their investigative motive, if any, that would be evaluated by the reasonableness standard.[259] However, the investigative motives are still there and in reality could be the driving force for the officers' warrant request.[260] To obtain a warrant, officers would simply have to articulate an "objectively reasonable" belief that community caretaking is necessary in order to enter a home[261]; for example, the oft-cited unanswered knock at the door.[262]

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256. Harper, *supra* note 99, at 21 ("*Camara* in effect replaced probable cause with a reasonableness standard for administrative inspections by a balance of societal interests and needs versus a slight invasion of individual privacy.").

257. *See* Marinos, *supra* note 28, at 285.

258. *See supra* Parts II.C.1.c, II.2.C.a, II.2.C.e. Also note that prior to the expansion of the exception from automobiles to homes, scholars warned of the potential for abuse. *See, e.g.*, Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 471 (1988) ("Of course, there is some danger that the police will attempt to use the 'community caretaking function' as a pretext for the stop of a suspect to take advantage of the more relaxed seizure standard for such encounters.").

259. If the investigative motive were to be evaluated, it would be under the standard of probable cause normally used for criminal search warrants. *See* Illinois v. Gates, 462 U.S. 213, 235–36 (1983) (discussing that during the criminal warrant process, a judge should issue a warrant based on probable cause, and he should make the decision whether there is probable cause based on common sense).

260. For example, in *Pinkard*, police received a tip about people sleeping in an apartment near drugs and money, thought it "sounded like a drug house," and sent a gang unit to investigate. Brief of Plaintiff-Respondent, *supra* note 18, at 7; *see also supra* notes 17–20 and accompanying text. Police later claimed to have been concerned that the people could have been suffering from an overdose, yet the actions of police (sending in a gang unit) indicate they were taking down a drug house. *See supra* notes 17–20, 238 and accompanying text. The search of the home was upheld by the Wisconsin Supreme Court as a valid exercise of community caretaking. *See supra* note 22 and accompanying text.

261. *See supra* text accompanying note 177.

262. *See supra* notes 20, 115, 135 and accompanying text.

Absent an emergency and its accompanying indicators, an unanswered knock at the door could signify any number of things, including: the occupant needs assistance, the occupant is not home, the occupant cannot hear the knocking, the occupant is in the backyard, or the occupant does not wish to answer the door.[263] Is it really objectively reasonable to believe the unanswered knock signifies only the first option? It is difficult to posit the set of facts that would: (a) provide the objectively reasonable belief that someone needs help, and (b) allow time to wait for a warrant. This objection is similar to the objection to community caretaking warrants in emergency situations. The difference is that concerns that do not rise to the level of an emergency can wait.

Still, some courts, unconcerned with officers' subjective motivations, warn that police cannot wait. For example, in *State v. Gracia*, the Wisconsin Supreme Court notes that *if* the defendant had been "seriously injured," he would have needed medical attention.[264] And, in *State v. Pinkard*, it was the court that was concerned that officers could be prevented from assisting victims of a drug overdose.[265] Yet, the officers on the scene in *Gracia* showed so little concern for Gracia's condition that they were prepared to leave after they were initially unable to locate him.[266] Similarly, the officers in *Pinkard* "never articulated any concern about the possibility of an overdose,"[267] and they brought no medical personnel with them to the home.[268] Courts have raised the specter of tragedies potentially allowed to happen because of police not entering a home, even though the facts of the cases that generated these warnings are the best arguments against them.[269]

In some cases, the justifications provided by officers for community caretaking searches are obvious pretext. For example, in *Gracia* and *Pinkard*, officers' actions on the scene did not match up with their later-articulated concerns about the medical conditions of the defendants in

263. *See* People v. Ray, 981 P.2d 928, 944 (Cal. 1999) (Mosk, J., dissenting).

264. *See* State v. Gracia, 2013 WI 15, ¶ 25, 345 Wis. 2d 488, 826 N.W.2d 87 ("If Gracia had been seriously injured in the accident, quick medical assistance would have been necessary.").

265. *See* State v. Pinkard, 2010 WI 81, ¶¶ 39–40, 327 Wis. 2d 346, 785 N.W.2d 592, *cert. denied*, 131 S. Ct. 1001 (2011).

266. *Gracia*, 2013 WI 15, ¶ 8.

267. *Pinkard*, 2010 WI 81, ¶ 91 (Bradley, J., dissenting). While the officers testified that they had some level of concern, "there is nothing in the record indicating that Officer Lopez articulated anything about how or why he was concerned." *Id.* ¶ 84.

268. *Id.* at ¶ 87.

269. *See infra* notes 270–71 and accompanying text; *see also supra* notes 264–68.

those cases.[270] Similarly, in *Michigan v. Fisher*, the police claimed to be concerned about blood trails, yet they did not contact medical personnel.[271] Considering that courts tolerated the naked pretext in these cases, it is not an unfounded concern that such pretext could be the basis for warrants issued by courts under the lesser standard of reasonableness. If such warrants were issued in jurisdictions where mixed motive caretaking were allowed, police could effectively obtain criminal search warrants using a standard normally required for health and safety inspections.[272]

Warrants will not work to solve the problem of an expanded community caretaking exception. Absent an emergency, in which case a warrant is not required, it is unnecessary for the police to enter a home immediately to render assistance. If officers also suspect a crime, then they are free to get a warrant on that basis and should do so—using the proper standard of probable cause.[273] If police are unable to meet that standard, it may be inconvenient for them, but that is why the Fourth Amendment was adopted in the first place. With or without warrants, community caretaking searches of homes present a serious threat to Fourth Amendment rights.

D. It Is Time to Roll Back the Expansion

The U.S. Supreme Court has warned that too narrow a view of Fourth Amendment rights can lead to a slow and steady erosion of those rights.[274] In other words, as Wisconsin Supreme Court Justice Bradley feared, yesterday's close call has become today's norm.[275]

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270. *See supra* note 266 and accompanying text.

271. Michigan v. Fisher, 558 U.S. 45, 550 (2009) (Stevens, J., dissenting) (finding "the police decision to leave the scene and not return for several hours—without resolving any potentially dangerous situation and without calling for medical assistance—inconsistent with a reasonable belief that Fisher was in need of immediate aid").

272. Camara v. Mun. Court, 387 U.S. 523, 535–36 (1967).

273. *See* U.S. CONST. amend. IV.

274. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 635 (1886). In 1886, the Court warned:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and *unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure*. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Id. at 635 (emphasis added).

275. *See* State v. Pinkard, 2010 WI 81, ¶ 66, 327 Wis. 2d 346, 785 N.W.2d 592 (Bradley,

Community caretaking, once a limited exception, has, through the malleable standard of reasonableness, greatly expanded.[276] The seeds of this expansion are seen in the *Cady* decision, which spawned the community caretaking exception.[277] Immediately after explaining that community caretaking is "totally divorced" from the "acquisition of evidence," the Court pointed out that a warrantless search of a vehicle could be reasonable to prevent the removal or destruction of evidence even if the possibility of such removal or destruction was "remote, if not nonexistent."[278] Community caretaking itself is arguably an expansion and weakening of the exigent circumstances test.[279]

This Comment shares Wisconsin Supreme Court Justice Prosser's recent concern that the "exception is now being stretched and extended even more."[280] Not only has the community caretaking exception expanded to homes, but its protective limits have been stretched and weakened over time.[281] When the Wisconsin Supreme Court expanded community caretaking, it also weakened the totally divorced standard set in *Cady*.[282] Its view is that the U.S. Supreme Court was simply "noting that many police-citizen encounters have nothing to do with crime, not [as] requiring that they must have nothing to do with crime."[283] The exception is stretched further because pretext is now tolerated and even sometimes provided by the courts.[284] This new tolerance—one might say encouragement—of naked pretext is the most dangerous aspect of allowing the community caretaking exception to cover warrantless home searches. If mere silence can reasonably indicate a person in need of medical attention, whether one knows someone is present or not, then a simple unanswered knock on the door

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J., dissenting) ("I fear that today's close call will become tomorrow's norm."), *cert. denied*, 131 S. Ct. 1001 (2011).

276. *See supra* Part II.C.

277. *See generally supra* Part I.

278. *See* Cady v. Dombrowski, 413 U.S. 433, 441–42 (1973).

279. *See supra* note 240.

280. State v. Gracia, 2013 WI 15, ¶ 70, 345 Wis. 2d 488, 826 N.W.2d 87 (Prosser, J., dissenting) ("What appeared to some members of the *Pinkard* court as a significant departure from the core principles of the exception is now being stretched and extended even more.").

281. *See supra* notes 176–82 and accompanying text.

282. *See supra* note 176 and accompanying text.

283. State v. Kramer, 2009 WI 14, ¶ 35, 315 Wis. 2d 414, 759 N.W.2d 598 (alteration in original) (quoting People v. Cordero, 830 N.E.2d 830, 841 (Ill. App. Ct. 2005) (O'Malley, J., concurring)).

284. *See supra* notes 236–39 and accompanying text.

by police becomes an exception to the Fourth Amendment warrant requirement.[285] Suspicion of drug activity, combined with an after-the-fact concern about an overdose, becomes all that is needed for police to make a warrantless home entry.[286] Furthermore, if drugs are uncovered during those warrantless entries, it is unlikely a court will find the searches unreasonable.[287]

The U.S. Supreme Court must act to roll back this expanded and weakened exception. There is reason to believe that it may do so in the near future. In 2006, the Court granted certiorari in *Brigham City* to resolve a circuit split on another Fourth Amendment exception—the emergency doctrine[288]—and, in 2012, it clarified the *Brigham City* decision in *Ryburn*.[289] In 2013, the Court settled two more Fourth Amendment questions in *Missouri v. McNeely*[290] and *Florida v. Jardinnes*.[291] Resolving Fourth Amendment conflicts remains an area of active interest for the Court, and community caretaking needs to be addressed.[292] As more jurisdictions contribute to "the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence,"[293] it is more likely that the Court will have to sort out the

285. *See* Fink, *supra* note 231, at 153.

286. State v. Pinkard, 2010 WI 81, ¶ 92, 327 Wis. 2d 346, 785 N.W.2d 592 (Bradley, J., dissenting) ("[A]n unarticulated concern about the possibility of an overdose can always be later invoked by a court when officers arrive at what they think is a 'drug house.'"), *cert. denied*, 131 S. Ct. 1001 (2011).

287. *See* Dimino, *supra* note 208, at 1499–500 ("A malleable standard in Fourth Amendment cases presents a particular danger that it will be practically difficult to declare unreasonable a search that has resulted in the seizure of evidence proving a defendant's guilt."). *But see* Scalia, *supra* note 62, at 1181–82 (speculating that what constitutes a reasonable search is left to judges because "we do not trust juries to answer the . . . question dispassionately when an obviously guilty defendant is in the dock").

288. Brigham City v. Stuart, 547 U.S. 398, 402 (2006) ("We granted certiorari in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." (citations omitted)).

289. *See* Ryburn v. Huff, 132 S. Ct. 987, 990 (2012) (per curiam).

290. Missouri v. McNeely, 133 S. Ct. 1552, 1556 (2013) (holding that the dissipation of alcohol in the blood is not a per se exigency).

291. *See supra* note 57.

292. *See* David L. Hudson, *Courts In a Muddle Over 4th Amendment's Community Caretaking Exception*, ABA JOURNAL (Aug. 1, 2013, 3:09 AM), http://www.abajournal.com/magazine/article/courts_in_a_muddle_over_4th_amendments_community_caretaking_exception/; Nicholas J. Wagoner, *New Exception Allowing Warrantless Home Entries Headed to the High Court?*, CIRCUIT SPLITS (Jan. 6, 2012, 7:00 AM), http://www.circuitsplits.com/2012/01/a-new-exception-to-warrantless-searches-of-the-home.html.

293. New York v. Quarles, 467 U.S. 649, 663–64 (1984) (O'Connor, J., concurring).

mess.[294]

The decisions in *Jones* and *Jardines* provide a roadmap, which the Court should use to resolve the conflict over the community caretaking exception when it finally reaches the high court.[295] The reach of the reasonableness standard has exceeded its grasp. While reasonableness initially added to people's Fourth Amendment protections, it is now at the point where it is taking those protections away.[296] The Court began to correct this problem in *Jones*, continued to do so in *Jardines*, and should do so again with a case on the community caretaking exception.[297] The Court must confine the community caretaking exception to automobiles and people outside of their homes. The expansion into homes should be halted and reversed.

Jones "provide[d] the foundation for a paradigm shift in the interpretation of the Fourth Amendment."[298] Until *Jones*, searches were evaluated solely in light of the reasonable expectation test.[299] After *Jones*, physical intrusion has been reinvigorated as a protector of the Fourth Amendment.[300] *Jardines* built on the foundation laid in *Jones* by applying the physical intrusion test to the home.[301] The expansion of the community caretaking exception to the home is entirely about physical intrusion. The physical intrusion of placing a device on the underside of an automobile, rejected in *Jones*, [302] and the sniffing nose of a dog on a porch, rejected in *Jardines*,[303] are arguably much less intrusive than a

294. *See* MacDonald v. Town of Eastham, No. 12-12061-RGS, 2013 WL 2303760 at *5 (D. Mass. May 24, 2013) (explaining that when "[f]aced with [both the] absence of controlling authority and conflicting precedent" about whether community caretaking applied to home entries, officers who entered a home "would not have known whether [their] actions violated [the occupant's] Fourth Amendment rights" and were thus entitled to qualified immunity against a § 1983 action); Hudson, *supra* note 292 (highlighting the confusion among the courts and noting that "the Supreme Court may need to wade into the troubled waters of community caretaking to explain the concept it identified 40 years ago").

295. Florida v. Jardines, 133 S. Ct. 1409 (2013); United States v. Jones, 132 S. Ct. 945 (2012).

296. *See supra* notes 66–70 and accompanying text.

297. *See supra* notes 53–59 and accompanying text.

298. Erica Goldberg, *How* United States v. Jones *Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 62 (Mar. 2011), http://www.michiganlawreview.org/assets/fi/110/Goldberg.pdf.

299. *See supra* note 53 and accompanying text.

300. *See supra* notes 54–56 and accompanying text.

301. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

302. United States v. Jones, 132 S. Ct. 945, 948, 954 (2012).

303. *Jardines*, 133 S. Ct. at 1417–18.

police officer actually entering a home. If the mere placement of a device on the exterior of a car, or a dog sniffing from a porch are physical trespasses, *a fortiori* police officers' physical entry into the interior of a home must be a trespass. The Court has applied the physical intrusion test to a car and to the curtilage of the home, surely it is ready to apply it to the threshold of the home.[304]

Jones and *Jardines* are clearly based on an originalist interpretation of the Fourth Amendment.[305] Fortunately, homes are places that both originalist "physical intrusion" justices and "expectation of privacy" justices agree deserve substantial protection:

> In none is the *zone of privacy* more clearly defined than when bounded by the unambiguous *physical dimensions* of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."[306]

Denying the expansion based on "physical intrusion" would allow the originalist members of the Court to continue to expand that rationale, while the others could deny the expansion based on the privacy expectations people hold in their homes.

One potential obstacle to such a ruling is the *Jones* decision's requirement that "[t]respass alone does not qualify" as a search; the trespass must be combined with "an attempt to find something or to obtain information."[307] However, once the police enter a home with an investigatory purpose, what it is the police are investigating is irrelevant.[308] Moreover, despite this recent resurgence of the trespassory test, *Jones* does not replace *Katz* and the existing elements of Fourth Amendment jurisprudence.[309] "[A]n unconsented police entry . . . into a

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304. *See Jardines*, 133 S. Ct. at 1415; *Jones*, 132 S. Ct. at 951–52.

305. In *Jardines*, Justice Scalia discusses the historical definition of curtilage from 1769. *Jardines*, 133 S. Ct. at 1415 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 225 (1769)); *see also* Jones, 132 S. Ct. at 950 ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (alteration in original) (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001))).

306. Payton v. New York, 445 U.S. 573, 589 (1980) (alteration in original) (emphasis added) (quoting U.S. CONST. amend. IV).

307. *Jones*, 132 S. Ct. at 951 n.5.

308. *Id.* at 954 ("There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated.").

309. *Id.* at 953 ("[W]e do not make trespass the exclusive test. Situations involving

residential unit" is still a search.[310] Additionally, common instances of community caretaking—looking for potentially injured persons, checking into what appears to be a burglary, or investigating strange smells or noises—arguably have some investigatory purpose[311] and could reasonably meet that requirement of the *Jones* search test.

IV. CONCLUSION

Fourth Amendment rights have proven as malleable as the reasonableness standard once invoked by the courts to protect them. Steady hammering over the years has weakened them both.[312] To re-strengthen Fourth Amendment rights, the U.S. Supreme Court must reshape the community caretaking exception using the stronger physical intrusion standard. If it does not, people's homes, in which they once had their strongest Fourth Amendment protections, will offer no greater refuge than their automobiles. This result cannot be what the Framers had in mind when guaranteeing to all Americans the "right . . . to be secure in their [*homes*]."[313]

In 1759, thirty years before the Fourth Amendment was proposed, Richard Jackson said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[314] Whether we deserve it or not, the trend is that once we give

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merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.").

310. *See* LAFAVE, *supra* note 38, § 2.3(b).

311. *See supra* notes 103–04, 114, 129, 156, 165–66 and accompanying text.

312. *See supra* notes 66–71 and accompanying text.

313. U.S. CONST. amend. IV (emphasis added). The Fourth Amendment was adopted partially in response to "general warrants," which were common at the time and "exposed any person or property to seizure 'in the most arbitrary manner.'" WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, 684 (2009) (quoting Statement of Governor Patrick Henry, in the Virginia Ratifying Convention (June 24, 1788), *in* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 588 (Jonathan Elliot ed., Washington D.C., 2d ed. 1836) [hereinafter DEBATES]); *see also* Maryland v. King, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (quoting DEBATES, *supra* note 313, at 588) ("Patrick Henry warned that the new Federal Constitution [without the Fourth Amendment] would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'").

314. RICHARD JACKSON, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENSYLVANIA 289 (London, Printed for R. Griffiths 1759) (emphasis omitted). Many people incorrectly attribute this sentiment to Benjamin Franklin, but he was not its author. 3 BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN 124–26 & n.1 (John Bigelow ed., New York, G.P. Putnam's Sons 1887).

up liberty for safety, we receive neither.[315] By expanding the community caretaking exception, in the name of safety, courts have given up our liberties. Under the cover of reasonableness, the courts have hammered our malleable Fourth Amendment liberties into a new shape—one that would be unfamiliar to those who drafted and adopted that amendment. The Court must take control before the hammering shatters those liberties, leaving the people of this country with mere fragments of a once robust constitutional guarantee.

GREGORY T. HELDING*

315. *See, e.g.*, Massimo Calabresi & Michael Crowley, *Homeland Insecurity: After Boston, The Struggle Between Liberty and Security*, TIME MAGAZINE, May 13, 2013, at 22, 24–28. Despite an October 2011 grant of new surveillance powers to FBI agents to fight domestic terrorism, domestic terrorists were still able to strike the Boston Marathon in 2013. *Id.* at 24.

*Candidate for J.D., 2014, Marquette University Law School; B.S.E.E., 1994, Marquette University. I thank Professor Lisa A. Mazzie for helping me to grow as a legal writer and for inspiring the topic of this Comment, and Professor Daniel D. Blinka, Professor Chad M. Oldfather, Kate M. O'Malley, and the staff of the *Marquette Law Review* for their valuable assistance in editing this Comment. I especially thank my dear wife Julie for her unyielding support, without which my accomplishments in law school would have been impossible.